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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SAC AND FOX NATION,

Cross-Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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The Cross-Respondent, Oklahoma Tax Commission, respectfully requests that this Court deny the Cross-Petition for a Writ of Certiorari filed by the Sac and Fox Nation seeking review of the Tenth Circuit's opinion in this case pertaining to the questions presented in the Cross-Petition. That opinion is reported at 967 F.2d 1425 (1992).

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

NON-TRIBAL MEMBERS ARE SUBJECT TO STATE TAXATION WITHIN INDIAN COUNTRY.

The Sac and Fox Nation, Tribe hereafter, is attempting to reach a novel and far-reaching conclusion in its Cross-Petition that any non-tribal member who is subject to tribal taxation is automatically exempt from any state taxes for which the nonmembers may be responsible.

Specifically, if a nonmember of the Tribe pays income taxes and motor vehicle taxes to the Tribe, then that nonmember is exempt from

state imposed income and motor vehicle taxes under the Tribe's theory. The benefit of this theory to the Tribe is that tax revenues which rightfully belong to the State would be diverted from the State to the Tribe. The problem with the Tribe's plan is that there is no authority for it. The Tenth Circuit correctly rejected the Tribe's theory in its decision below and found that the Indian Commerce Clause does not bar state taxation of nonmembers on Indian Country, the Tribe cites no authority showing that any court has interpreted the jurisdictional language of any Indian treaty so as to grant a tribe exclusive jurisdiction over non-tribal members, the Indian gaming decision's relied on by the Tribe were distinguishable from the situation of the state's taxation of nonmember's income and motor vehicles and the Tribe has failed to show how the imposition of a state tax on nonmembers frustrates tribal self-government.

The state has all right, jurisdiction and authority to tax non-tribal members on Indian Country, see *Thomas v. Gay*, 169 U.S. 264 (1898), cattle owned by non-Indian and grazed on Indian Country leased from tribe were taxable by the state, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), non-Indians who undertake activity on Indian Country are taxable by state, *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), non-Indians purchasing cigarettes from tribal stores on Indian Country are subject to state taxes, *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989), non-Indian oil and gas producer whose operations were located on Indian reservation was subject to state oil and gas taxes.

The Tribe urges in its Cross-Petition that the Tenth Circuit opinion is in conflict with several state courts of last resort which have held that the income or property of Indians who are not members of the reservation tribe within whose Indian Country they reside are not taxable by the state. The Commission would point out that the Tenth Circuit's opinion below is not in conflict with any decision of the Oklahoma Supreme Court and that the Tribe never explains why or how the Tenth Circuit is bound by decisions of other state courts on this federal question, and on top of all that, the decisions of other state courts regarding the administration of tax law in other states has no bearing on how Oklahoma administers its tax law. The state court decisions cited by the Tribe involve different states, different laws and different circumstances from the case at bar and

provide no authority for the Tribe to effectively shelter thousands of non-tribal members from Oklahoma taxes. How another sister state administers its tax law has no effect on Oklahoma tax administration. The question is, does Oklahoma's administration comport with federal law and policy. This Court has held that it does. Oklahoma has the authority to tax non-tribal members within Indian Country, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, _____ U.S. ____, 111 S.C. 905 (1991). In *Colville* this Court held, "Federal statutes, even given the broadest reading to which they are susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe."

The Tribe next urges that the Tenth Circuit should have used provisions in the Treaty of Fort Harmar of 1789, 7 Stat. 28, to grant the Tribe exclusive jurisdiction over all persons who "settle upon their lands," leaving no room for state taxation of either tribal members or nonmembers.

The authority of that treaty is dubious because it does not represent the final word from Congress regarding the Sac and Fox and does not contemplate the Tribe's removal to Indian Territory which was, at that point, *In Futuro*. In fact, the treaty of 1789 was consummated before the United States had acquired the territory encompassing the State of Oklahoma in the Louisiana Purchase of 1803. The treaty also preceded the Tribe's removal to Indian Territory (1867), the disestablishment of the tribal reservation (1891) and Oklahoma statehood (1907). There has been a lot of water under the bridge since the Tribe negotiated its more ancient treaties. The laws regarding the Sac and Fox have changed since 1789, and that prerogative is owned by Congress, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

It is not unusual that Congress has changed the laws, rights or entitlement of Indian tribes and, in fact, Congress has done so often. This Court ruled on the subject in *The Cherokee Tobacco*, 11 Wall. 616 (1871), where this Court ruled:

> A treaty may supersede a prior act of Congress...and an act of Congress may supersede a prior treaty.... In the cases referred to, these principles were applied to treaties with

> foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief. (Citations omitted)

The Sac and Fox are governed by different laws than those granted in the 18th century due to changing circumstances and the ceaseless movement of time. Because of the decisions of Congress in the interval, the Treaty of Fort Harmar is unreliable.

In Section II of the Cross-Petition, the Tribe asserts that tribally derived income of non-tribal members should be exempt from state taxation. The Tribe cites several decisions of this Court which prevented the particular states involved from taxing certain nonmembers on the reservation under certain conditions. The cases usually involved business activity of a non-Indian company doing business on an Indian reservation under federal regulations. This Court held that a state cannot tax a non-Indian business on the reservation when federal laws or regulations have pre-empted the state law.

The problem with the Tribe's argument in this case is that the Tribe has not indicated where federal law has pre-empted Oklahoma's income and motor vehicle taxes. Also, the Tribe has failed to show how the taxation of non-tribal members infringes on tribal self-government. Further, the Tribe has not provided any reason why this Court should review the questions presented in its Cross-Petition concerning the Appeal Court's opinion.

CONCLUSION

For these reasons, the Oklahoma Tax Commission respectfully requests this Court to deny the Cross-Petition for Writ of Certiorari filed by the Sac and Fox Nation.

Respectfully submitted,

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